Fordham Law School

FLASH: The Fordham Law Archive of Scholarship and History

Decisions in Art. 78 Proceedings | Article 78 Litigation Documents

September 2021

Decision in Art. 78 proceeding - Brown, Andrew (2009-08-05)

Follow this and additional works at: https://ir.lawnet.fordham.edu/pdd

Recommended Citation

"Decision in Art. 78 proceeding - Brown, Andrew (2009-08-05)" (2021). Parole Information Project https://ir.lawnet.fordham.edu/pdd/178

This Parole Document is brought to you for free and open access by the Article 78 Litigation Documents at FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Decisions in Art. 78 Proceedings by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

Matter of Brown v New York State Bd. of Parole
2009 NY Slip Op 31733(U)
August 5, 2009
Supreme Court, Albany County
Docket Number: 6429-08
Judge: Joseph C. Teresi
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

[* 1]

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of
ANDREW BROWN, #95-A-3248

Petitioner,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

DECISION and ORDER
INDEX NO. 6429-08
RJI NO. 01-09-9924

-against-

NEW YORK STATE BOARD OF PAROLE;
NEW YORK STATE DEPARTMENT OF
CORRECTIONAL SERVICES,

Respondents.

Supreme Court Albany County All Purposes Term, July 24, 2009
assigned to Justice Joseph C. Teresi

APPEARANCES:

Andrew Brown, #95-A-3248
Pro Se Petitioner
Sullivan Correctional Facility
P.O. Box 116 Riverside Drive
Fallsburg, New York 12733

Andrew M. Cuomo, Esq.
Attorney General of the State of New York
Attorney for the Respondents
(Robert M. Blum, Esq. AAG)
The Capitol
Albany, New York 12224

TERESI, J.:

Petitioner commenced the instant CPLR Article 78 proceeding challenging the denial of

parole on October 2, 2007. Respondents seek by motion the dismissal of the petition as moot alleging that the petitioner appeared for a new parole release hearing in September, 2008. The petitioner opposes the motion and seeks additional relief including an order directing his immediate release and transfer to immigration authorities for deportation, an order of protection, an injunction to compel a timely response to petitioner's current administrative appeal and compensatory damages.

The petition seeks to compel a determination of petitioner's administrative appeal and immediate release to parole supervision. With respect to that portion of the petition which may be deemed to seek relief in the nature of mandamus, 9 NYCRR § 8006.4 (a) (2) provides "the appeals unit will issue written findings of fact and/or law, and recommend disposition of the appeal." Subdivision (b) of such regulation provides "Upon the issuance by the appeals unit of its findings and recommendation the appeal will be presented as soon as practicable to three members of the Board of Parole for determination." It thus appears that the respondents' regulations require respondents to provide an administrative appeals process and to act on such appeals in a timely manner.

> "Mandamus to compel is appropriate only where a clear legal right to the relief sought has been shown, the action sought to be compelled is one commanded to be performed by law and no administrative discretion is involved (see CPLR 7803[1]; *Matter of Brusco v Braun*, 84 NY2d 674, 679; *Matter of Young v Coccoma*, 291 AD2d 767, 768; *Matter of Kupersmith v Public Health Council of State of N.Y.*, 101 AD2d 918, 919, affd 63 NY2d 904). In other words, '[t]he act to be compelled must be ministerial, non-discretionary, non-judgmental, and [must] be premised upon specific statutory authority mandating performance in a specific manner' (*Matter of Brown v New York State Dept. of Social Servs.*, 106 AD2d 740, 741; *see Matter of Van Aken v Town of Roxbury*, 211 AD2d 863, 864, lv denied 85 NY2d 812)." (*New York Civil Liberties Union v State of New York*, 3 AD3d 811, 813-814 [3d Dept 2004] affd 4 NY3d 175 [2005]; *see also Klostermann v Cuomo*, 61 NY2d 525, 539 [1984]).

The petition on its face seeks a determination of petitioner's administrative appeal as required by the regulations. It does not seek a specific outcome. Respondents contend that the claim fails to state a cause of action, citing 9 NYCRR § 8006.4 (c), which provides:

> "Should the appeals unit fail to issue its findings and recommendation within four months of the date that the perfected appeal was received, the appellant may deem this administrative remedy to have been exhausted, and thereupon seek judicial review of the underlying determination from which the appeal was taken. In that circumstance, the division will not raise the doctrine of exhaustion of administrative remedy as a defense to such litigation."

Respondents contend that such regulation makes judicial review the exclusive remedy if an administrative appeal is not timely determined. However, the regulation does not state that it provides the exclusive remedy. Rather, the regulation on its faces states that the appellant *may* deem his administrative remedy to have been exhausted. While courts have regularly held that a failure to render a determination on an appeal does not alter or directly affect the administrative process, allowing a petitioner to deem the administrative remedy exhausted and immediately commence an article 78 proceeding (*see People ex rel. Tyler v Travis*, 269 AD2d 636 [3d Dept 2000]; *Matter of Graham v New York State Div. of Parole*, 269 AD2d 628 [3d Dept 2000]; *Matter of Lord v State of N.Y. Exec. Dept. Bd./Div. of Parole*, 263 AD2d 945 [4th Dept 1999]), it has been held that a petitioner is entitled to judgment compelling a timely determination of an administrative appeal, notwithstanding the provisions of 9 NYCRR § 8006.4 (c) (*Matter of Buford v Russi*, 152 Misc 2d 23, 24-25 [Sup Ct, Orange County 1991]; *see also People ex rel. Johnson v New York State Bd. of Parole*, 180 AD2d 914, 917-918 [3d Dept 1992]; *Matter of Singleton v Russi*, 152 Misc 2d 188, 189-190 [Sup Ct, Orange County 1991]). Thus, it appears that the petition states a valid cause of action in the nature of mandamus.

However, respondents have shown that petitioner was granted a new parole release interview and that parole was again denied. While the petition requests an order directing parole release, the only relief which the Court or the administrative appeal could grant is a de novo release hearing (*see Matter of Siao-Pao v Travis*, 5 AD3d 150 [1st Dept 2004]; *Matter of Lichtel v Travis*, 287 AD2d 837, 838 [3d Dept 2001]; *Matter of King v New York State Div. of Parole*, 190 AD2d 423, 434-435 [1st Dept 1993], affd 83 NY2d 788 [1994]). Since petitioner has already received all the relief which could be granted, the proceeding is moot, warranting dismissal (*see Matter of Latham v New York State Div. of Parole*, 54 AD3d 1081 [3d Dept 2008]; *Matter of LaSalle v New York State Div. of Parole*, 52 AD3d 1071, 1072 [3d Dept 2008]; *Matter of Malangone v Dennison*, 46 AD3d 1155 [3d Dept 2007]). Petitioner has not shown that any exception to the mootness doctrine is applicable (*id.*).

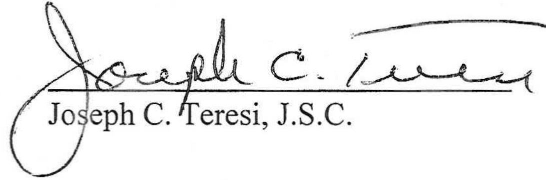
The additional requests for relief made in petitioner's reply are not within the scope of the petition and as such are not properly before the Court. As such, they shall be denied.

Accordingly, the petition is dismissed as moot.

This Decision and Order is being returned to the attorney for the respondents. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York
August 5 , 2009



Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Order to Show Cause dated August 18, 2008;
2. Verified Petition dated January 23, 2009;
3. Notice of Motion dated June 25, 2009;
4. Affirmation of Robert M. Blum, Esq. dated June 25, 2009 with attached exhibits A-F;
5. Affidavit of Patrick Lawlor dated June 24, 2009;
6. Affidavit of June E. Burtt dated June 24, 2009;
7. Reply of Andrew Brown dated July 10, 2009 with attached exhibits 1-3.